IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 27, 2007 Session

IN RE: ESTATE OF CORNELIUS THEODORE RIDLEY

CAROLYN RIDLEY
v.
WILLIAM KEITH RIDLEY

Appeal from the Seventh Circuit (Probate) Court for Davidson County
No. 03P-1538 Randy Kennedy, Judge

No. M2006-01109-COA-R3-CV - Filed on August 9, 2007

This appeal involves the construction of a will and imposition of attorney's fees. The Probate Court found that the language of the will gave the Decedent's second wife a life estate in the marital home with a one-half remainder to his stepdaughter. For the reasons stated herein we find that the language of the will does not support such a construction, and we reverse. The attorney's fees will have to be reconsidered in light of our reversal on the will construction issue.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Seventh Circuit (Probate) Court Reversed.

WALTER C. KURTZ, SP. J., delivered the opinion of the court, in which DAVID R. FARMER and HOLLY M. KIRBY, JJ., joined.

Melvin L. Raymond, St. Louis, MO, and Eva Lemeh, Nashville, TN, for the appellant, William Keith Ridley.

Mary J. Chukinas Lagrone, Nashville, TN, for the appellee, Carolyn Ridley.

OPINION

This is an appeal from the Seventh Circuit Court (Probate Court) of Davidson County by the son (William Ridley) of the Decedent challenging the decision of the Probate Court construing the Decedent's will in favor of his second wife, Carolyn Ridley (Appellee), by determining that the Appellee has a life estate in the marital home and that Carolyn Ridley's daughter by a previous

marriage has a one-half interest in the remainder. The Appellant also challenges the subsequent awarding of attorney's fees. The Appellee asserts that the decisions of the Probate Court were correct, but preliminarily she contends that this appeal was untimely.

Cornelius Theodore Ridley (Decedent) died testate on June 13, 2003. His wife, Carolyn Ridley, submitted his will (dated June 1, 1988) to probate and was appointed executrix of the estate. In addition to his wife, the Decedent left two children, Constance Ridley Smith and Appellant William Keith Ridley. Carolyn Ridley had a daughter, Karen Elizabeth Bennett, by a prior marriage. On June 1, 1988, the Decedent and Carolyn Ridley not only executed wills but also entered into a prenuptial agreement.

On March 8, 2004, Carolyn Ridley, as executrix, petitioned the Probate Court to construe the following provision of the Decedent's will:

> I direct one-half (½) of any real property accumulated during the marriage to my wife and the other one-half (½) to my two children Constance Ridley Smith and William Keith Ridley with but one exception, any home my wife and I have purchased for us to live in. In this instance we have agreed that the survivor will have a life estate in the home with the remainder going to the children in fee as follows: one-half to Karen Elizabeth Bennett [Carolyn Ridley's daughter from a previous marriage], one-fourth to Constance Ridley Smith and one-fourth to William Keith Ridley.

The Probate Court subsequently, on September 2, 2004, held a hearing to dispose of the will construction issue, and its decision is reflected in an order entered September 17, 2004.

In its order of September 17, 2004, the Probate Court concluded that this provision was clear and unambiguous and held that Carolyn Ridley was vested with a life estate in the marital home on Setters Road; the remainder interest in the property was awarded to the children: 50% to Karen Elizabeth Bennett, 25% to Constance Ridley Smith, and 25% to William Keith Ridley. The Probate Court also granted Carolyn Ridley's petition to set aside a quitclaim deed, ruling it had no effect. The insertion of the quitclaim deed into the dynamic of this case is confusing but ultimately of no consequence as its invalidity was not raised on appeal. It appears that after Mr. Ridley's death Carolyn Ridley, acting on the mistaken advice of a paralegal, quitclaimed her interest in the property to her husband's children. This action was related to an unsuccessful attempt to settle the dispute between the parties. Again, the Probate Court's setting aside of the quitclaim deed is not an issue raised on appeal.

The Appellant argues that the language in the will can mean no more than that the wife would receive a life estate in the marital home only if it was purchased subsequent to the marriage. Since the Decedent already owned the Setters Road property and built the house prior to the marriage, the

language in the will could not be interpreted to give the Appellee a life estate. The Appellant also references the prenuptial agreement as corroboration of the Decedent's intent that previously owned real property was not contemplated by the life estate language in the above will provision. The court below ruled, however, that the language in the will should be interpreted so as to give Carolyn Ridley a life estate and that this interpretation was not inconsistent with the prenuptial agreement. The Appellant takes issue with this interpretation.

On October 18, 2005, William Ridley filed a motion to alter or amend the September 17, 2004 order of the Probate Court. This motion was denied on December 6, 2004. On January 13, 2006, William Ridley filed a motion asserting again that the will did not grant the Appellee a life estate and asserting further that the trial court should not have set aside the quitclaim deed. A hearing was held on April 28, 2006, and the trial court denied Mr. Ridley's motion by an order of May 15, 2006. The court also granted Carolyn Ridley's claim for attorney's fees, which fees were to be paid from the Appellant's distribution from the Decedent's estate. William Ridley appeals.

1. TIMELY APPEAL

The Appellee asserts that the appeal of the will construction issue was not timely. The Appellee first raised this issue by way of a motion to dismiss in this Court. A prior panel of this Court rejected her argument.

> The appellee asserts that the September 17, 2004 order was a final judgment and that, pursuant to Tenn. R. App. P. 4, the appellant was required to file his notice of appeal within thirty days after the trial court's December 6, 2004 order denying the motion to alter or amend. The appellant responds that the September 17, 2004 order was not final because it did not resolve all the claims between the parties and that the time for filing his notice of appeal did not begin to run until all claims were resolved and the estate was closed. Tenn. R. App. P. 3. We agree with the appellee that the September 17, 2006 order was appealable as of right. Tenn. Code Ann. § 30-2-315; *Estate of Cantrell,* 19 S.W.3d 842, 844 (Tenn. Ct. App. 2002). However, we view the right to appeal such orders as permissive rather than mandatory, *i.e.*, the right to an immediate appeal of an otherwise interlocutory order does not preclude a party from challenging the order in an appeal filed following the entry of a final judgment. While the appellant could have appealed the September 17, 2004 order at the time it was entered, he was not required to do so.

The Estate of Cornelius Theodore Ridley et al, M2006-01109-COA-R3-CV. Order of November 29, 2006.

Consistent with the above ruling, the Court would note that the decision of a trial court rejecting a will has been held to be a final, appealable order. *See In re Estate of Henderson*, 121 S.W.3d 643, 641-47 (Tenn. 2003). However, the converse is not true. A decision in favor of the will remains under the power of the trial court to alter until a final judgment regarding the estate is entered. Robinson & Mobley, 1 *Pritchard on the Law of Wills and Administration of Estates* § 340 (5th ed. 1994).

2. CONSTRUCTION OF THE WILL

The Appellant challenges the Probate Court's decision that the Decedent's will left his wife "a life estate in the home" and his stepdaughter a one-half interest in the remainder. The will provision at issue states:

> I direct one-half (½) of any real property accumulated during the marriage to my wife and the other one-half (½) to my two children Constance Ridley Smith and William Keith Ridley with but one exception, any home my wife and I have purchased for us to live in. In this instance we have agreed that the survivor will have a life estate in the home with the remainder going to the children in fee as follows: one-half to Karen Elizabeth Bennett, one-fourth to Constance Ridley Smith and one-fourth to William Keith Ridley.

The Appellant and his sister argued to the trial court that the prenuptial agreement between the Decedent and the Appellee contains language which either aided in the construction of the Decedent's will or would prevent the Appellee from taking pursuant to the terms of the will regardless of construction. Substantially, the provisions of the prenuptial agreement argued by the Appellant provide:

> First: Party of the first part hereby releases renounces and quitclaims all courtesy in the real property and all right to participate in the distribution of the personal property now owned by party of the second part, should he survive her, except for one-half (½) the value of the life insurance policy issued through the Metro Nashville Board of Education which will go to Carolyn Fludd Bennett and the other one-half (½) to be divided equally between Constance Ridley Smith and William Keith Ridley the only children of Cornelius Ridley.
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> Second: Party of the second hereby releases, renounces and quitclaims all homestead and dower in the real property, all right to participate in distribution of the personal property now owned by party of the first part should she survive him, except one-half

(½) the value of the life insurance policy issued through the Metro Nashville Board of Education which will go to Cornelius Ridley and the other one-half (½) to Karen Elizabeth Bennett the only daughter of Carolyn Fludd Bennett.

. . . .

Forth [*sic*]: That the parties will each make Wills which will; determine the disposition of property in the event of simultaneous death or common disaster; waiver any separate rights to dissent from the deceased will; reflect the spirit and intent of this agreement.

Fifth: And each of said parties hereby agrees, in the event of divorce all properties revert to its owner before the marriage. In particular what was Cornelius Ridley's before the marriage will continue to be his; and what was Carolyn Fludd Bennett's will continue to be hers. Any accumulated property, both real and personal during the marriage will be equally divided between the parties.

While the Appellant makes much of the prenuptial agreement, this Court does not find it to be of much import. This case is controlled by the language of the will.

On September 17, 2004 the Probate Court ruled, in pertinent part, as follows:

1. The Decedent, Cornelius Theodore Ridley, and his spouse, Carolyn Fludd Ridley, executed mirror wills on June 11, 1988, after [*underlined in original*] executing a prenuptial agreement;
2. . . . .
3. The Decedent testator and his wife, Carolyn Fludd Ridley, lived in only one house throughout their entire marriage and life together;
4. In hindsight, testamentary documents often could be drafted better; nevertheless, Draftsman Ed Kindall's deposition testimony provided only speculation with no definitive answer as to the interpretation of the testamentary language contained in Cornelius T. Ridley's Last Will and Testament dated June 11, 1988, nor could Mr. Kindall provide Testator's personal interpretation of said testamentary language;
5. Moreover, the Court finds it to be a question of law, and finds the language contained in Section V of the Decedent's Last Will and Testament dated June 1, 1988 to be clear and unambiguous in Testator's intention to vest Testator's wife, Carolyn Fludd Ridley with a life estate in their marital home at 4348 Setters Road, Nashville, Tennessee 37218, and remainder interests in said home to the children named therein for the following amounts: to Karen Bennett Moore a 50% fee simple remainder interest, to William Ridley a 25%

fee simple remainder interest, and to Constance Smith Ridley a 25% fee simple remainder interest;

6. Further, the court finds that if this issue had not been settled as a matter of law then the residual clause contained in Section VII of the will would then have applied to the marital home property at 4348 Setters Road, Nashville, Tennessee 37218;
7. . . . .
8. . . . .
9. . . . .

Therefore, it is ORDERED, ADJUDGED and DECREED that:

1. Pursuant to the clear and unambiguous language of the Last Will and Testament of Cornelius Theodore Ridley previously admitted to probate, Decedent/Testator's wife, Carolyn Fludd Ridley, **shall** [*bold in original*] receive a life estate in the marital home at 4348 Setters Road, Nashville, Davidson county, Tennessee 37218, and reminder interest shall vest with the parties' children as follows: to Karen Bennett Moore fifty percent (50%) remainder interest, to William Keith Ridley twenty-five percent (25%) remainder interest, and to Constance Ridley Smith twenty-five (25%) remainder interest; and
2. . . . .

Judge Highers, speaking for this Court, has recently set forth the standard of review when the trial court's construction of a will is before the Court on appeal:

> While will contests involve factual questions to be resolved by a trier of fact, will constructions involve questions of law left for resolution by the court. *In re Estate of Eden*, 99 S.W.3d 82, 87 (Tenn. Ct. App. 1995). Accordingly, a probate court's construction of a will includes conclusions of law which we review de novo with no presumption of correctness. *Briggs v. Estate of Briggs*, 950 S .W.2d 710, 712 (Tenn. Ct. App. 1997) (citing *Presley v. Hanks*, 782 S .W.2d 482, 487 (Tenn. Ct. App. 1989)).
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> "Construction suits recognize the testator's right to direct the disposition of his or her property and thus, limit a court to ascertaining and enforcing the testator's directions." *In re Estate of Eden*, 99 S.W.3d at 87 (citing *Daugherty v. Daugherty*, 784 S .W.2d 650, 653 (Tenn. 1990)). "The cardinal rule in construction of all wills is that the court shall seek to discover the intention of the testator and give effect to

> it unless it contravenes some rule of law or public policy." *Briggs*, 950 S.W.2d at 712 (citing *Third Nat'l Bank in Nashville v. First Am. Nat'l Bank of Nashville*, 596 S.W.2d 824, 828 (Tenn. 1980)); *see also In re Will of Padgett*, 364 S.W.2d 947, 951 (Tenn. Ct. App. 1962). "The testator's intention is to be ascertained from the particular words used in the will itself, from the context in which those words are used, and from the general scope and purposes of the will, read in light of the surrounding and attending circumstances." *Presley*, 782 S.W.2d at 487 (citing *Moore v. Neely*, 370 S.W.2d 537, 540 (Tenn. 1963); *Fisher v. Malmo*, 650 S.W.2d 43 (Tenn. Ct. App. 1983)); *see also Mongle v. Summers*, 592 S.W.2d 594, 596 (Tenn. Ct. App. 1979). We are not permitted to undertake an examination of what a testator is supposed to have intended. *Presley*, 782 S.W.2d at 488; *see also Stickley v. Carmichael*, 850 S.W.2d 127, 132 (Tenn. 1992); *Briggs*, 950 S.W.2d at 712. Recognizing that a testator has an absolute right to have his property disposed of according to his direction, *Daugherty*, 784 S.W.2d at 653, we must attempt to construe a will so that every word and clause contained therein is given effect. *Briggs*, 950 S.W.2d at 712.

Hargis v. Fuller, 2005 WL 292346, at *3-4 (Tenn. Ct. App. Feb. 7, 2005).

Further, in will construction:

> The testator's intention must be ascertained from "that which he has written" in the will, and not from what he "maybe supposed to have intended to do," and extrinsic evidence of the condition, situation and surroundings of the testator himself may be considered only as aids in the interpretation of the language used by the testator, and "the testator's intention must ultimately be determined from the language of the instrument weighed in the light of the testator's surroundings, and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention not justified by the language of the writing itself."

Nichols v. Todd, 20 Tenn. App. 564, 101 S.W.2d 486, 490 (1936) (quoting Sizer's *Pritchard on Wills* §§ 384, 387, 388, and 409 (2d ed.)); *see also In re Crowell*, 154 S.W.3d 556, 559 (Tenn. Ct. App. 2004).

The order of September 17, 2004, which construed the will and applied it to the facts, was the result of a hearing held by the Probate Court on September 2, 2004. The September 2, 2004 hearing was confused since much of the proof was the result of a colloquy between the court and counsel which in turn could be termed a series of stipulations. The trial judge would ask if a certain fact was at issue and, if all counsel agreed to the factual assertion, then it was considered a

stipulation.[1] At that hearing only two witnesses testified – attorney Edward Kindall (by deposition) and his paralegal and daughter, Marjorie Tansil. For reasons not explained, the Appellee did not testify.

According to the exchange between the trial judge and counsel the parties agreed that:

1. Prior to the marriage the Decedent owned the property on Setters Road that became the marital home. He had also built a home on the property before the marriage. He took out a $60,000.00 loan to build the house, paid $20,000.00 down, and financed the remainder of $40,000.00.
2. Subsequent to the marriage both parties put money from a joint account into the home and financed jointly a home equity loan that was used in part for home improvement.
3. The home on Setters Road was the marital home of the Decedent and the Appellee throughout their marriage.
4. The Appellee was not on the deed, but her name was on the home equity loan taken out sometime after the marriage.

Even before the testimony of the two witnesses the trial judge stated:

> Then obviously we're got that, too. From where I'm sitting, if the facts before me show that the – and they may. I'm not prejudging anybody's proof, but if the facts support a position that the widow contributed significant monies to the development of and maintenance of a holding on of this home as a marital residence, and unless I have some proof diametrically opposed to that, it is likely that I'm going to find that the home, or that the sentence in the will that says in this instance we have agreed that the survivor will have a life estate in the home with the remainder going to the children in fee as follows, one-half to Karen, one-fourth to Constance, and one-fourth to Keith –
>
> I'm likely to find that that applies to this residence, to this home, but I don't want to foreclose anybody's opportunity to present evidence to the contrary.
>
> . . . .
>
> I am convinced that if this was the only real property that was utilized as a home for these parties, that he intended that by this paragraph, that the home be enjoyed with a life estate by his surviving spouse, and that upon her death, or upon his death, that the fee simple title to the property would vest one-half to Karen Elizabeth Bennett, Carolyn's daughter, and one-fourth to Constance Ridley Smith, and one-fourth to Keith Ridley.

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[1] Oral stipulations are binding on the parties. *Dep't of Highways v. Urban Estates*, 465 S.W.2d 357, 360 (Tenn. 1971). It would be helpful on appellate review if the oral stipulations were more clearly set forth.

Ms. Tansil's testimony was entirely focused on the quitclaim deed. As previously explained, the validity of that deed is not an issue on appeal.

According to Mr. Kindall, both the Decedent and Carolyn Ridley came to him in 1988 for a prenuptial agreement and their respective wills. The two appeared together at his office before their contemplated marriage on July 16, 1988 and discussed the prenuptial agreement. The Decedent and the Appellee explained to Mr. Kindall what they desired in their prenuptial agreement. Mr. Kindall drafted the prenuptial agreement based upon what the parties had explained. Later the Decedent and the Appellee returned to Mr. Kendall's office, reviewed the draft, and signed a finalized prenuptial agreement.

Mr. Kindall testified that he understood from the Decedent and the Appellee that both had surviving children from their former marriages and that it was their intent in entering into the prenuptial agreement that title to property owned by each of them before their marriage should vest in their respective children upon the death of either party.

The Decedent and the Appellee each executed wills on June 1, 1988 following execution of the prenuptial agreement. Mr. Kendall also prepared the wills. According to his testimony, the Decedent's intention with respect to the will was the same as with the prenuptial agreement: that title to property he owned before he married the Appellee vest in his children upon his death.

Mr. Kindall testified that at the time the Decedent and the Appellee made the prenuptial agreement it was his understanding that the Decedent was the sole owner of the property at 4348 Setters Road on which he had recently built a house.

The Appellee retained Mr. Kindall shortly after the Decedent's death as counsel to represent her in her capacity as executrix of the Decedent's estate. Shortly thereafter, she began bringing various documents relating to administration of the estate to Mr. Kindall's office. Mr. Kindall, in connection with his representation of the Appellee, in correspondence to the Appellant's counsel dated July 9, 2003, noted that the Decedent and the Appellee hired him in 1988 to prepare a prenuptial agreement "to protect the assets that Mr. Ridley gained from his previous marriage (a house and vacant land) . . . ." This is the house located on Setters Road.

The record does not show the income or occupation of the Appellee. Nor does it reflect the amount of the couple's joint account or the amount of the home equity loan. The evidence produced at the September 2004 hearing was not only informal but left significant gaps. The Appellee in her brief cites to the trial transcript (TR, III, p. 20-23) as providing this information, but reference to those pages reflects statements of counsel which were never agreed to or entered as stipulations and cannot be considered proof. The Appellee contends that the proof at the hearing (TR, III, p. 20-28) indicates that the home in which the married couple lived was not completed at the time of their marriage and that the Appellee made a significant financial contribution to its completion. Here again, a reading of the transcript does not support the Appellee's contention. Not only does the

record not support the Appellee's assertion, but the absence of testimony from the Appellee has to be considered of some significance. *See Dickey v. McCord*, 63 S.W.3d 714, 721-22 (Tenn. Ct. App. 2001) (absence of expected favorable witness can allow for unfavorable inference). The only testimony at the hearing on the issue was from Mr. Kindall, and this evidenced that the home was built before the marriage. The Appellee, who had moved the Probate Court to construe the will, did not testify.

This Court is of the opinion that the trial judge was mistaken in his resolution of this issue. The trial judge was attempting to reach what he considered a fair and equitable result and allow the widow to remain in the home she shared with her deceased husband. That result is, however, inconsistent with the language of the will. Imposition of the life estate was conditioned as applying only to "any home my wife and I have purchased for us to live in." Whatever the Appellee may have contributed to the upkeep and improvement of the home, it did not result in her becoming a purchaser or a co-purchaser. The land and house were not purchased by the parties subsequent to the marriage. The Decedent already owned the real property, and un-refuted proof indicates that the house was built prior to the marriage. Furthermore, if the wife was a purchaser with her husband of real property then this clause would be meaningless for she would be an owner by tenancy by the entirety. If the clause means that any purchase of a home by the Decedent after his marriage would be considered "their" home, a life estate is still not created as the Decedent owned the subsequently used marital home prior to the marriage. Finally, if it could be argued that when he acquired the land and built the house he intended it to be the marital home, there is no proof supporting such a conclusion.

The Court finds that the language of the will simply does not support the trial court's finding of the life estate with a one-half remainder to the Appellee's daughter. The life estate and one-half remainder to Karen Elizabeth Bennett were only to apply to a marital home purchased after the marriage. No such home was ever purchased.

3. ATTORNEY'S FEES

The challenged imposition of the $850.00 attorney's fee was based on the trial judge's determination that the motion to alter or amend his prior order was without merit. The motion before him addressed both the will's construction and the setting aside of the quitclaim deed. Given that we have reversed the trial judge on the issue of will construction, that portion of the fees which reflects the will contest must be set aside. We find that it was within the judge's discretion to award attorney's fees related only to the unsuccessful motion to set aside the quitclaim.

DECISION

We reverse the trial court on its determination that the Appellee was entitled to a life estate in the Setters Road property with a one-half remainder to her daughter, and we remand the case for further proceedings not inconsistent with this opinion. We further find that the attorney's fees must be set aside, but we also remand that issue for the trial court to calculate an appropriate fee apportioned only to the motion to set aside the trial court's prior decision as to the quitclaim deed.

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WALTER C. KURTZ , SPECIAL JUDGE